The order of the learned Registrar made on 3 January 1991 and upheld by the learned Judge in the High Court is therefore set aside and is substituted therefor, the order dated back to 3 January 1991 as follows:

(1) Loss of expectation of life ... RM 6,500.00
(2) Funeral expenses ... RM 4,500.00
(3) Cost of applying for letters of administration ... RM 400.00
(4) Loss of future earnings ... RM65,000.00

All sums above shall carry interest at the usual rates of 4% p.a. and 8% p.a. except for the loss of future earnings which shall carry no interest.

On the question of costs, the plaintiffs have succeeded in part, but they in fact recover less than what was awarded to them by the learned Registrar earlier. We therefore make no order as to costs here but the costs in the Court below remains payable by the defendants and be paid to the plaintiffs by the defendants after taxation.

HASIL BUMI PERUMAHAN SDN. BHD. & 5 ORS.

v.

UNITED MALAYAN BANKING BHD.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK AMAR HAJI MOHD JEMURI BIN SERJAN CJ (BORNEO),
DATO' PEH SWEE CHIN SCJ,
DATO' MOHAMED DZAIDDIN BIN HJ ABDULLAH SCJ
[CIVIL APPEAL NO. 02-41-1992]
2 DECEMBER 1993

PRACTICE AND PROCEDURE: Setting aside judgment in default - Whether judgment irregular - Whether there is good defence on merits - Standard of proof - When a order is entered.

The 1st appellant, a housing developer, was granted a bridging finance loan by the respondent. The 2nd, 3rd, 4th, 5th and 6th appellants guaranteed repayment of the loan. It was alleged that the respondent had breached its obligations under the loan agreement and letter of offer and as a result of this the 1st appellant incurred loss of profits, loss of sales and other damages. The appellants filed a writ against the respondent.

The writ of summons and statement of claim was served on the respondent's solicitors on 22 February 1991. On 23 February 1991 appearance was entered and served. When defence was not filed by 16 March 1991, the appellant's solicitor served, on the respondent's solicitors the customary 48 hours notice, requiring the defence to be filed. The respondent's solicitors attempted to seek an extension of three weeks to file the defence but it was futile. On 26 March 1991 the defence was filed and served. On 19 April 1991 judgment in default was entered by the appellants' solicitor but the judgment itself was dated 23 March 1991.

Held:

[1] In a case under O. 19 r. 3, there is no statutory obligation on the part of the solicitors for the appellants to file a draft judgment which is required only in a case under O. 42 r. 8. What was done here was

ex-abundanti cautela. The relevant rule applicable in the instant case is r. 10(1), (2) and (3). The solicitors for the appellants need only draw up the judgment under r. 10 (2) and present it to the SAR for entry and under r. 10(1) the SAR should enter in the cause book kept for the purpose. Under this rule sub-rule, on entering such judgment the SAR should file the judgment and return the duplicate thereof to the appellants solicitor. At the time of entering the judgment the prescribed Court fees under O. 91 for entry of such judgment must first be paid by means of the prescribed praecipe which will be duly registered and impressed on copy of the judgment. On the proper construction of O. 42 r. 10(1) , (2) and (3) the judgment in default was irregular and must be set aside *ex debito justitiae.*

[2] In order to succeed in his application under O. 13 r. 8 and O. 19 r. 9 the applicant must show that he has a defence which has some merits and which the Court should try. To use common and plain language, the applicant must show that his defence is not a sham defence but one that is *prima facie,* raising serious issues as *bona fide* reasonable defence that ought to be tried because obviously if the defence is a sham defence there is no defence and the application must fail.

[3] All the issues which are substantial and have merits ought to be tried at a proper trial so that witnesses may be called to explain to the Court what is the nature of banking commercial practice in processing and approving the loan and other relevant issues. The justice of the case, bearing in mind the substantial claim of the damages, demands nothing less than a proper trial of all the issues.

[Appeal dismissed with costs].

[Bahasa Malaysia Translation of Headnote]

AMALAN DAN PROSEDUR: Mengenepikan penghakiman ingkar - Sama ada penghakiman di luar aturan - Sama ada terdapat pembelaan yang baik atas merit - Standard kebutikan - Bila sesuatu perintah dicatatkan.

Perayu pertama, sebuah syarikat pemaju perumahan, telah diberikan pinjaman kewangan bersambung oleh respondent. Perayu-perayu kedua, ketiga, keempat, kelima dan keenam telah menjamin pembayaran balik pinjaman tersebut. Dikatakan bahawa responden telah melanggar obligasinya di bawah perjanjian pinjaman tersebut dan surat tawaran dan akibatnya perayu pertama telah menanggung kehilangan keuntungan, kehilangan jualan dan lain-lain kerugian. Para perayu telah memfailkan writ terhadap responden.

Writ saman dan pernyataan tuntutan telah disampaikan kepada peguamcara responden pada 22 Februari 1991. Pada 23 Februari 1991 kehadiran telah dimasukkan dan disampaikan pada hari yang sama. Apabila pembelaan tidak difailkan menjelang 16 Mac 1991, peguamcara perayu menyampaikan kepada peguamcara responden, notis 48 jam yang diwajibkan itu, meminta supaya pembelaan difailkan. Peguamcara responden cuba memohon lanjutan masa selama tiga minggu untuk memfailkan pembelaan tetapi tidak berjaya. Pada 26 Mac 1991 pembelaan difailkan dan disampaikan. Pada 19 April 1991 penghakiman ingkar telah dicatatkan oleh peguamcara perayu tetapi penghakimannya bertarikh 23 Mac 1991.

Diputuskan:

[1] Dalam kes di bawah Aturan 19 kaedah 3, tiada obligasi statutori dipihak peguamcara bagi perayu untuk memfailkan draf penghakiman yang mana hanya dikehendaki di bawah A. 42 k. 8. Apa yang telah dilakukan di sini ialah *ex-abundanti cautela*. Kaedah relevan yang terpakai dalam kes ini ialah kaedah 10(1), (2) dan (3). Peguamcara bagi perayu hanya perlu menggubal penghakiman di bawah kaedah 10(2) dan mengemukakannya kepada Penolong Kanan Pendaftar (PKP) untuk dicatatkan dan di bawah kaedah 10(1) PKP harus mencatatkannya dalam buku kausa yang disimpan untuk tujuan tersebut. Di bawah sub-kaedah ini, atas pencatatan penghakiman yang sedemikian PKP perlu memfailkan penghakiman tersebut dan memulangkan salinan penduanya kepada peguamcara perayu. Semasa pencatatan penghakiman tersebut fee Mahkamah yang ditetapkan di bawah A. 19 bagi pencatatan penghakiman yang sedemikian mestilah dibayar melalui praesipi yang ditetapkan yang mana akan didaftarkan

dengan sempurnanya dan dicatatkan pada salinan penghakiman tersebut. Atas pentafsiran betul akan A. 42 k. 10(1), (2) dan (3) penghakiman ingkar tersebut adalah di luar aturan dan harus diketepikan *ex debito justitiae.*

[2] Untuk berjaya dalam permohonannya di bawah A. 13 k. 8 dan A. 19 k. 9, pemohon mestilah menunjukkan bahawa beliau mempunyai pembelaan yang ada merit dan yang mana Mahkamah harus bicarakan. Dalam bahasa yang lebih mudah, pemohon mestilah menunjukkan bahawa pembelaannya bukanlah sesuatu yang palsu tetapi ialah *prima facie*, membangkitkan isu-isu yang serius sebagai *bona fide* pembelaan munasabah yang harus dibicarakan dan pastinya jika pembelaan tersebut adalah palsu maka tiadalah pembelaan dan permohonan itu akan gagal.

[3] Segala isu yang substansial dan mempunyai merit haruslah dibicarakan di perbicaraan yang sepatutnya agar saksi-saksi dapat dipanggil untuk menerangkan kepada Mahkamah apakah jenis amalan bank perdagangan dalam memproses dan meluluskan pinjaman dan lain-lain isu yang relevan. Demi keadilan kes ini, dengan mengambil ingatan tuntutan substansial akan kerugian, maka perbicaraan yang wajar perlulah diadakan berhubung dengan isu-isunya.

[Rayuan ditolak dengan kos].

Cases referred to:

Tatchee Machinery Agency v. Posan Timber Trading Sdn. Bhd. [1989] 1 MLJ 388 ***(foll)***

Jasabena Sdn. Bhd. v. Beh Hing Poo [1985] 1 MLJ 394 ***(dist)***

Evans v. Bartlam [1937] AC HL (E) 473 ***(foll)***

Apline Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc. [1986] LLR Vol. 2 (CA) 221 ***(cit)***

Fira Development Sdn. Bhd. v. Goldwyn Sdn. Bhd. [1989] 1 CLJ 1 / [1989] 1 MLJ 40 ***(cit)***

P.L. Construction Sdn. Bhd. v. Abdullah Bin Said [1988] 2 CLJ 808 / [1989] 1 MLJ 60 ***(cit)***

East Asiatic Co. (M) Bhd. v. Kamanis Sdn. Bhd. [1985] 2 MLJ 227 ***(cit)***

Eng Mee Yong v. Letchumanan [1979] 2 MLJ 216 ***(cit)***

American Cyanamid Co. v. Ethicon Ltd. [1975] Ac 396 ***(cit)***

Independent Automatic Sales Ltd. v. Knowels & Foster [1962] 3 All ER 27 ***(cit)***

Hadley v. Baxendale [1854] 9 Ex. 341 ***(cit)***

Legislation referred to:

Rules of High Court 1980, O. 14, O. 19 rr. 3, 8 & 9, O. 13 rr. 7 & 8, O. 42 rr. 1, 7, 8, 10(1), (2), (3), (4), (5), O. 53 & O. 91

For the appellants - C.V. Das (Anthony Leong with him); M/s. Riza Leong & Partners

For the respondent - T. Thomas (Aznam bin Mansor with him); M/s. Skrine & Co.

JUDGMENT

Haji Mohd Jemuri bin Serjan CJ(Borneo): There are only two basic important issues which call for our determination in this appeal, one being whether the judgment in default entered by the appellants against the respondent was irregular and thereby may be set aside under O. 19 r. 9 of the Rules of the High Court 1980, and the other whether assuming that the judgment is regular, it nevertheless may be set aside on the ground that the respondent has a good defence on merits.

The facts of the case may be briefly stated as follows. The 1st appellant is a private limited company and engaged in the business of a housing developer in respect of a housing project in Taman Seri Buloh. The 2nd appellant, also a private limited company, signed a guarantee on 26 August 1986 to guarantee all monies granted by the respondent to the 1st appellant and all the liabilities incurred by the 1st appellant in respect of the loans not exceeding RM6.3 million, namely, the total amount of the secured overdraft facility. The 3rd, 4th, 5th and 6th appellants are also guarantors under a guarantee dated 12 August 1986 for the same sum of RM6.3 million secured overdraft facility granted by the respondent to the 1st appellant. At the written request of the 1st appellant dated 10 November 1983, the respondent on 17 May 1984 approved and granted credit facilities to the 1st appellant as a financing credit line amounting to RM10 million, and an overdraft facility amounting to RM4.3 million which later was revised to RM6.3 million as a bridging-finance loan for the construction of 236 low-cost houses/flats; 148 single-storey terrace houses and 13 two-storey shophouses. The revised amount of the end-finance facility was in response to a request from the 1st appellant for a restructured facility

and approved by the respondent by his letter of offer dated 3 July 1986.

On 22 December 1990 the appellants filed a writ against the respondent claiming damages in the sum of RM29.1 million, being loss of profits, loss of sales, interests imposed by the respondent on account of delay or stoppage in the work, compensation paid to purchasers because of delay in granting possession, solicitors' fees, management costs, compensation to guarantors, accummulated interests, withdrawal of offer and loss of reputation on the part of the 1st appellant on the averment that the respondent was guilty of breach of its obligation under the provisions of the agreement dated 22 July 1985 and the letter of offer dated 3 July 1986 both of which will be discussed later and referred to in this judgment as "banking contract". It was averred in the statement of claim that on the basis of the application dated 10 November 1983 whereby the 1st appellant applied for credit facilities it was crucial that the 1st appellant obtained credit facilities from the respondent in order to implement the housing scheme successfully and an immediate payment of RM2.4 million was required for the purpose of statutory and professional fees. Further, it was averred that under the terms of the agreement dated 22 July 1985 the respondent had agreed to release the total amount of the end-finance facility that the respondent had offered to the qualified purchasers of the subdivided lots together with the buildings thereon not exceeding RM10 million direct to the 1st appellant, and that the respondent was aware that this end-finance facility was to be utilized for the repayment of the overdraft facilities upon acceptance of the application for the bridging-finance and end-finance facility by the respondent. On that understanding the 1st appellant had commenced development of the housing scheme.

The 1st appellant had submitted 223 applications for the end-finance facility and it was averred that if all the applications were to be approved a sum of RM7.07 million would be made available to the 1st appellant. However, the respondent had failed to meet its obligations as a banker under the agreement and the terms agreed upon in the application letter and offer letter when it rejected 62 applications nine months after receipt of the applications, and saw fit to approve only 109 applications eight months after the date of submission of the applications. Even after granting approval to the 109 applications, and after 30% - 50% of the progressive works had been certified to have been completed the respondent still failed, refused or neglected to disburse the end-finance sum to the 18 purchasers and to the 1st appellant. Besides, the fate of 52 other applications had not been made known by the respondent. Thus, it was averred that the failure on the part of the respondent to observe and fulfil its obligations under the banking contract was mainly due to management and financial problems faced by the respondent with the result that the 1st appellant could not continue to complete the housing scheme. Hence, under the circumstances, the 1st appellant suffered damages in the sum of RM29.10 million due solely to the breach by the respondent of the banking contract.

On 22 February 1991 a writ of summons endorsed with the statement of claim was served on Messrs. Skrine & Co., the solicitors for the respondent. On 23 February 1991 appearance was entered on behalf of the respondent and served on the solicitors for the appellant on the same day. The last day for filing the defence was 16 March 1991, but when no defence was filed on that date the appellants' solicitors by letter dated 19 March 1991 served on the respondents' solicitors the customary 48 hours' notice requiring the defence to be filed. Upon receipt of this letter and after futile efforts to communicate with the appellants' solicitors the respondents' solicitors wrote to seek an extension of time of three weeks to file the defence. Notwithstanding this request, a defence was nevertheless prepared and filed on 26 March 1991. It was served on the appellants' solicitors on the same day. Three weeks later, on 19 April 1991 a judgment in default was entered by the appellants' solicitors but the judgment itself was dated 23 March 1991.

The question for our determination on the first issue is, therefore, whether the judgment in default dated 23 March 1991 but actually entered as a fair-copy on 19 April 1991 is an irregular judgment and thereby may be set aside on that score. Relying on the authority of the decision of V.C. George J. in the case of *Tatchee Machinery Agency v. Posan Timber Trading Sdn. Bhd* [1989] 1 MLJ 388 his Lordship in the High Court below decided that the judgment in default of appearance should have been dated after 19 April 1991 and not 23 March 1991, that is, the date stated in the draft judgment by which time there was already a defence filed and the Senior Assistant Registrar, therefore, should have rejected the application for a default judgment. His Lordship continued to say that in spite of that there was still a remedy available to the appellants by applying to have the defence struck out for not complying with the rules and such application would be heard *inter partes*.

It is worthy of note that in *Tatchee Machinery Agency's case (supra)* a distinction was drawn between judgments or orders that were pronounced, given or made, and judgments that were entered. In the case of judgments to be pronounced, the pronouncement, giving or making of the judgments or orders, had to be made before the judgments or orders could be drawn up. Such judgments or orders take effect from the day of their dates and should be dated on the day on which they were pronounced, given or made. (See O. 42 r. 7). On the other hand, in the case of judgments or orders that are entered they have to be drawn up first before they are entered, and they take effect on their being entered. The date of the judgments or orders must necessarily be the date they are entered. (See O. 42 r. 10(2)). With respect, *Tatchee Machinery Agency's* case was correctly decided. Before us Counsel for the appellants advanced the argument that *Tatchee Machinery Agency's* case *(supra)* was wrongly decided because O. 42 r. 10(5) was not considered in holding that in dating the default judgment, the date when the draft judgment was filed, that is, 23 March 1991, the Senior Assistant Registrar was backdating the judgment. In that case the Court also failed to note the distinction between "drawing up" and "entering". Counsel submitted that O. 42 r. 10 (4) and (5) made it clear that an order had to be drawn up before being entered; "drawing up" being the physical preparation of the draft order and "entering" being the filing of the draft order. On the proper interpretation, according to Counsel, of O. 42 filing should be equated with entering so that the date of a default judgment was the date on which the draft default judgment was filed in Court, quoting Edgar Joseph J. (as he then was) in *Jasabena Sdn. Bhd. v. Beh Hing Poo* [1985] 1 MLJ 394. Therefore, in effect, what was submitted was that the date when the draft was filed was the date when it should be entered, namely 23 March 1991 and not 19 April 1991. In any event, *Tatchee Machinery Agency's* case *(supra)* was a default in appearance that was decided under O. 13 r. 7 which rule did not apply to the instant case which was a default in defence case under O. 19 r. 8 He, therefore, submitted that the default judgment was regular and that the respondent must show the defence on merits in order to succeed in its application to set aside the default judgment.

We must admit that the proposition was persuasive but, with respect, we cannot accept it as it lacked substance, and putting it at its highest, it had the trappings of an ingenious proposition.

It did not escape our attention that there were two occasions when the filing of the judgment took place, one on 23 March 1991 when the draft judgment was filed and the other on 19 April 1991 when the fair copy was filed. If Counsel was right in his submission then there should be two separate dates when "entering", was made since "entering", according to him, meant "filing". Surely it is beyond argument that there should not be two separate dates of entering the same judgment and we cannot accept the draft judgment for the purpose of the entry under O. 42 r. 10(1) as the solicitors for the 1st appellant chose to have a draft faired in the first instance. It must be the fair copy of the judgment that should be presented for entry in complying with all the requirements of the Rules of the High Court.

In our view, in a case under O. 19 r. 3 as is the case in this appeal, there is no statutory obligation on the part of the solicitors for the appellant to file a draft judgment which is required only in a case under O. 42 r. 8 What was done here was *ex abundanti cautela*. The relevant rule applicable in the instant case is r. 10(1), (2) and (3). The solicitors for the appellants need only to draw up the judgment under r. 10(2) and present it to the Senior Assistant Registrar for entry and under r. 10(1) the Senior Assistant Registrar should enter it in the cause book kept for that purpose. Under this sub-rule, on entering such judgment the Senior Assistant Registrar should file the judgment and return the duplicate thereof to the appellant's solicitors. It must, however, also be emphasised here that at the time of entering the judgment the prescribed court fees under O. 91 for entry of such judgment must first be paid by means of the prescribed praecipe which will be duly registered and impressed on the copy of the judgment. The praecipe in this case was registered on the day the fees were paid and the judgment should only be entered after the payment of the prescribed fees. There was uncontroverted evidence that the judgment was entered on 19 April 1991, the day it was presented and signed by the Senior Assistant Registrar after the prescribed fees had been paid. It should also be obvious from the above that the determining factor for the purpose of deciding when such judgment is entered under O. 42 r. 10 is the payment of the prescribed court fees without which the judgment could not be entered and signed by the Senior Assistant Registrar. The Senior Assistant Registrar was labouring under a mistaken belief that he was under a duty to accept the draft judgment and sign it for approval. At any rate, in our view, that for the purpose of O. 42 r. 10(1) a draft judgment is not a judgment since a draft implies that it needs perfection and approval. It follows that the argument that the judgment was entered when the draft was filed for the approval of the Senior Assistant Registrar and that the date of filing the fair judgment could be related back to the date when the draft copy of the judgment was filed was not correctly grounded and could not be sustained and we reject it as being without basis. The weakest point in the appellants' arguments was on the submission that the learned Judge did not take into consideration r. 10(4) and (5). The answer to this is simple. Rule 10(4) and (5) are only clearly applicable to orders and not to the judgments and the learned Judge was absolutely right to ignore the two sub-rules. For the sake of completeness we should interpolate to say that *Jasabena's case* has no application to cases under O. 42 as it concerns a case under O. 53 which is distinguishable, not only in its terms but also on the facts obtaining in the present case. Equating filing with entering under such order is fully justified in the context of that order.

In our view, on the proper construction of O. 42 r. 10(1), (2) and (3) the judgment in default was irregular and must be set aside *ex debito justitiae* and we, therefore, order that the judgment be accordingly set aside. This would be a sufficient ground for us to dismiss the whole appeal but then the learned Judge went on to consider, assuming he was wrong to hold the default judgment irregular, whether on the merits of the defence the judgment should also be set aside in the exercise of his discretion under O. 19 r. 9.

It must be pointed out at this juncture that it is not unusual to read in English law reports of plaintiff's solicitors signing judgments in default of appearance and perhaps in default of defence as well (see *Evans v. Bartlam* [1937] AC HL (E) 473 at p. 477), giving the impression that it is actually so in practice, but in Malaysia, strictly in compliance with O. 42, it is not the plaintiff's solicitors who sign such a judgment but the Senior Assistant Registrar on the presentation of the judgment and payment of the court fees. The plaintiff's solicitors do not sign the judgment but such a judgment is entered by the Senior Assistant Registrar, to use the technical term.

His Lordship held that he was satisfied that the respondent had shown that he had a defence on merits and on that score

also the judgment was set aside citing *Evans v. Bartlam* on the assumption that he was wrong in deciding that the default judgment was irregular.

On the second issue the starting point in the light of the provisions of O. 19 r. 9 is whether the learned Judge is right in the exercise of his discretion when he set aside the default judgment and in doing so did his Lordship correctly interpret and apply the guidelines formulated by the Law Lords in the case of *Evans v. Bartlam (supra)*. It seems to us that counsel for the appellants did not dispute the correctness of Lord Atkin's *dictum* that unless and until the court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure. What counsel for the appellants urged upon us was that in order for the court to set aside a default judgment under O. 19 r. 9 the court should apply the test as formulated by Roger Ormrod in *Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.* [1986] LLR Vol. 2 (CA) 221. In that case Sir Roger Ormrod expressed the view that on its proper interpretation the Law Lords in the case of *Evans v. Bartlam* clearly contemplated that a defendant who was asking the court to exercise its discretion to set aside the default judgment should show that he had a defence which had a real prospect of success. Therefore, Counsel for the appellants urged us to accept Sir Roger Ormrod's view that in order to arrive at a reasoned assessment of the justice of the case the court must form a professional view of the probable outcome of the judgment if the judgment were to be set aside and the defence develop, and that the "arguable defence" must carry some degree of conviction. However, it behoves us to point out from the outset that Sir Roger Ormrod himself did not appear to be firm as to which standard should be applied because at one point in his judgment he was talking about a "real prospect of success" and at another "reasonable prospect of success", and in between he ventured another test that in order to set aside a default judgment the defence must show that there was an "arguable defence" which must carry some degree of conviction. Even if we accept that these standards are mere options for the court to take, Sir Roger Ormrod appeared to us to depart from the standard that was to be met by a defendant in such a case although he claimed that the standard he formulated was based on a construction of the words used by the Law Lords in *Evans v. Bartlam* in that the standard as we understand them in Malaysia as formulated by way of guidelines in *Evans v. Bartlam* guidelines is much lower.

A scrutiny of the case of *Evans v. Bartlam* would show that different Law Lords used different terms but they all seem to agree that for the defendant to succeed in his application to set aside a default judgment he must show that the defence had merits that ought to be tried by the court. In other words, in popular language, the defence was not a sham defence. Lord Atkin was of the view that it was sufficient for the defendant to file an affidavit on merits, meaning that the applicant must produce to the court evidence that he had a *prima facie* defence. (See page 480). Lord Wright, on the other hand, at p. 489 was of the view that the primary consideration was whether the defendant had merits to which the court should pay heed, and if the merits were shown the court would not *prima facie* desire to let a judgment pass on which there had been no proper adjudication. If the defendant showed merits, then he clearly showed an issue which the court should try. Lord Russell of Killowen, on his part, reminded the courts not to fail to consider whether any useful purpose could be served by setting aside the judgment and that obviously no useful purpose would be served if there were no possible defence to the action. In other words, the standard laid down by Lord Russell is not that much lower and that it is sufficient if the defendant can show he has possible serious defence.

In Malaysia the tendency of the courts hitherto is to follow the guidelines enunciated in the case of *Evans v. Bartlam*, bearing in mind also that this is a House

of Lords' case while *Saudi Eagle's case* is the decision of a Court of Appeal. In Malaysia, we are not bound by the decisions of the House of Lords but the courts always accept those authorities as persuasive authorities which may be followed. Indeed, this Court has occasion to consider the question whether a judgment in default should be set aside under O. 13 r. 8 and did in fact approve and follow Lord Atkin's *dictum*. Thus, in *Fira Development Sdn. Bhd. v. Goldwyn Sdn. Bhd.* [1989] 1 MLJ 40 Lee Hun Hoe, CJ (Borneo) (as he then was) held that a defence on the merits meant merely raising only an arguable or triable issue, not unlike any O. 14 cases and that a judgment in default was not a judgment on merits. In other words, it was decided in that case that a judgment in default may be set aside if the facts show a defence has merits. *Fira's* case was followed by Zakaria Yatim J. in *P.L. Construction Sdn. Bhd. v. Abdullah bin Said* [1989] 1 MLJ 60. Again, V.C. George J. in *East Asiatic Company (M) Bhd v Kamanis Sdn. Bhd.* [1985] 2 MLJ 227 used such expression as "*bona fide* reasonable defence" to describe the standard of the defence that must be met for the applicant to succeed to set aside a default judgment, although he cited no authority for his proposition, and it seemed to us the proposition was redolent of Lord Atkin's *dictum*. Consistent with the decision of our own courts in the past in dealing with issues such as those under O. 13 r. 8 and O. 19 r. 9 the guidelines in *Evans v. Bartlam (supra)* should be accepted. In our view, in order to succeed in his application under these Orders the applicant must show that he has a defence which have some merits and which the Court should try. To use common and plain language, the applicant must show that his defence is not a sham defence but one that is *prima facie*, raising serious issues as *bona fide* reasonable defence that ought to be tried because obviously if the defence is a sham defence there is no defence and the application must fail. It can hardly be emphasised that in order for the Court to arrive at a decision that the defence has merits it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. It involves a mental process that goes through the mind of a Judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision. At any rate whether we follow *Saudi Eagle* or *Evans v. Bartlam*, both cases only lay down, not rules of law, that must be stringently complied with but merely guidelines to assist a Judge in the exercise of his discretion. So long as the Judge exercises his discretion according to principles of law the appellate court would hesitate to interfere with the Judge's exercise of discretion. It is for the appellants to convince us that this is a proper case for our interference with the learned Judge's exercise of his discretion under O. 19 r. 9.

Now it is true that in matters of discretion no one case can be authority for another (per Lord Wright in *Evans v. Bartlam*) and in deciding this appeal we have to examine the facts as they appear on the pleadings and in the affidavits of the parties, but before we go into them in detail we also remind ourselves that where there is a conflict of evidence on affidavits it would not be proper for us to believe one side and disbelieve the other. Such conflict should be resolved at the trial as it is not our function to try to resolve conflicts of evidence on affidavits at this stage. (See *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 216 and *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396.)

Casting our minds back to the statement of claim and the opposing affidavits of Encik Chien Kien Chuen, a Director of the 1st and 2nd Appellants, and on a careful analysis of the averments, the irresistable conclusion that is to be drawn therefrom is that the basis on which the cause of action arose contain two elements. The appellants started off with the premise that the 1st appellant had categorically stated in its letter of application dated 10 November 1983 that the release of the credit facilities were crucial to the implementation of the said housing

project. The full text of the letter is reproduced:

10th November 1983

Mr. K.C. Boon,
Executive Director,
United Malayan Banking
Corporation Bhd.,
UMBC Building,
Jalan Sulaiman,
Kuala Lumpur.

Dear Mr. Boon,

Proposed Housing Scheme On Lot 14679, Mukim Of Sungei Buloh, Selangor
Application For Credit Facilities

Further to our recent meeting in your office together with your Mr. P.K. Sim, we are pleased to enclose the following:

1. Letter of approval from the Pengarah Tanah dan Galian, Selangor approving the above mentioned housing scheme.
2. A copy of the report and valuation prepared by Khong & Jaafar Sdn. Bhd. placing a value of RM9 million on the land.
3. A copy of the layout plan of the proposed development prepared by our architect, Jurubina Sinar Murni Sdn. Bhd.
4. A copy of the economic viability study including cash flow projections prepared by our quantity surveyor, Nik Farid Dan Loh Sdn. Bhd.

You will note from the enclosed documents that it is a very attractive and viable scheme comprising mainly of low-cost and medium low-cost houses which the Government is encouraging developers to build. Our company is bumiputra majority held and the main beneficiary shareholders are as follows:

1. Tengku Mustaffar Ibni Tengku Idris Shah - a businessman.
2. Encik Abdul Aziz bin Yahaya - a professional manager and company director.
3. Mr. Lim Fung Chee - managing director of Kumpulan Emas Sdn. Bhd. and a director of several companies.
4. Mr. K.C. Cheah - a chartered/professional civil engineer with over 15 years construction and property development experience. Currently is the managing director of Siang Management Services Sdn. Bhd. providing property and construction management services.

a The above gentlemen are all experienced businessmen and professionals.

Our company had earlier taken a term loan in 1980 from your bank (Your Ref. CRO/CBK/KLE/SC) which had since been fully repaid.

b It is crucial that our company must obtain credit facilities in order to implement the scheme successfully and immediate payment in the form of statutory and professional fees amounting to RM2.4 million is required. Infrastructural work is expected to commence early in 1984 and the whole scheme is expected to be completed in two years. Details are indicated in the cash flow projections.

c As shown in the study by our quantity surveyor, the company will require funding facilities as follows:

d
1. Bank overdraft for immediate drawdown. RM 3 million
2. Bridging loan to be disbursed based on architect's/engineer's certificates commencing from early 1984. RM12 million
3. End financing to assist buyers. RM34 million

e As security for the above facilities, the company will create a first legal charge on the subject property in favour of your bank together with joint and several guarantees to be given by all directors of the company.

f We would be grateful if you could approve these facilities as soon as possible to assist our company to complete the proposed development.

Yours faithfully,
Hasil Bumi (Perumahan) Sdn. Bhd.

g (Signed)
(K.C. CHEAH)
Director.

Enc.

As will be discussed later only the following facilities were approved, namely:

h

(1) Secured overdraft to the limit of RM6.3 million which was the refund figure at the request of the 1st appellant; and
(2) End-finance facility up to RM10 million.

i

The secured overdraft facility was meant to be utilized for financing the development of the housing estate, consisting of 236 low-cost flats/houses, 148 single-storey terrace houses, 177 double-storey terrace houses and 13 double-storey shophouses. On obtaining and securing the commitments of the respondent to grant and release the said credit facilities, the 1st appellant commenced work and sales of the house to be constructed. The appellant specifically laid stress on their averments that the respondent held themselves out to the 1st appellant purchasers that they were the end-financiers of the housing scheme, and on the strength of this assumption 223 applications were submitted to the respondent for approval. Out of this number of applications, only 109 applications were approved, but so far no drawdowns had ever been made.

The appellant averred further that the breach of the banking contract was attributed directly to management and financial problems faced by the respondent. Thus, by paragraph 14 of the statement of claim and paragraph 11 of the affidavit dated 14 May 1991 of Encik Chien Kien Chuen, it was averred that the respondent had breached their duties under the arrangement, the cumulative effect of which resulted in the failure of the 1st appellant to continue and complete the housing project, thereby suffering the damages claimed for in the writ of summons.

To our minds the two elements constituting the basis on which the cause of action was based can be summarised as follows:

On the premise that the release of the facilities, (which particular facilities were not specifically pleaded) was crucial to the development and completion of the housing scheme, firstly, the failure on the part of the respondent to release these facilities and, secondly, based on the same premise the failure on the part of the respondent to release the approved end-finance loans when the applicants had complied with the conditions for the approval of the end-finance loans, at least in respect of the 109 approved applications led to breaches of the banking contract. The cumulative effect of these breaches, therefore, according to the pleadings and the affidavits in opposition, were the direct cause of the abandonment of the housing project and the resultant damages they suffered.

On their face value, the alleged breaches on the part of the respondent to disburse the facilities could also include the breach on the part of the respondent to release the secured overdraft, although Counsel for the appellant in his argument never in fact alluded to it. This was because the appellants claimed the housing project failed because they did not get the facilities which had been promised them and because it was the secured overdraft that was meant to be used to finance the development and completion of the housing scheme and not the end-finance. If there are any merits at all on these allegations it seems to us the respondent equally has a *prima facie* good defence which would be discussed later. That it was contemplated by the appellants the breach of disbursing the bridging-finance facility was also a basis for the claim to damages was further explained by the citation of the 2nd, 3rd, 4th, 5th and 6th appellants as parties to the action. The 2nd appellant, it must be recalled, was the corporate guarantor for the loan of RM6.3 million under a guarantee dated 26 August 1986 and the 3rd, 4th, 5th and 6th appellants were guarantors under a guarantee dated 12 August 1986 in respect of the same amount, being the bridging-finance facility to be utilised to finance the development of the housing project. On the other hand, the guarantors for the end-finance facility were the 3rd appellant, Encik Hoo Ke Ping @ Hoo Khi Ping, Encik Cheah Kok Cheong, Encik Lim Fung Chee and Tengku Mustaffar Ibni Tengku Idris Shah, in respect of the RM10 million end-finance facility which was to be used to repay the bridging-finance facility. It is somewhat baffling why if the cause of action is failure to release this amount or such amount as had already been approved, except for the 3rd appellant, the rest of the guarantors were never cited as parties to the action.

Thus, on the alleged breach to disburse the facilities agreed to be offered to the 1st appellant, the respondent's defence

was that they had released the secured overdraft, namely, the bridging-finance loans in the sum of RM6.3 million, and as such it was averred by the respondent that they had performed their obligations under the banking contract, and if the housing estate could not be completed it certainly was not due to the failure of the respondent to release the bridging-finance loan and therefore the respondent could not be made accountable for any damages as a result of the abandonment of the project for lack of funds or for any other reasons. By way of amplification to the defence to show that the failure on the part of the 1st appellant to continue and complete the housing project was not due to the breach of the banking contract on the part of the respondent, the respondent, by way of an affidavit of Encik Azizan bin Adam, the Manager of the respondent, averred that it was due to the incompetent and inefficient management of the scheme and that on 17 March 1988 the 1st appellant had entered into a contract with Ingeback (Malaysia) Sdn. Bhd. to complete the project within twelve months, and that on 23 April 1988 Bank Utama (M) Bhd. gave a loan of RM9.5 million including the end-finance to the 1st appellant. With all these additional bridging-finances there was no reason why the housing project could not be completed. *Prima facie* this certainly is more than just an arguable defence. It is a good defence which has merits and which the court should pay heed.

At this juncture, it would be appropriate to look at the relevant terms of the letter of offer relied on by the 1st appellant to ascertain the terms of the banking contract. The relevant part of the letter is reproduced for convenience:

Date: 3 July 1986

Hasil Bumi (Perumahan) Sdn. Bhd.,
4th Floor,
Lobby B. Wisma Segar,
No. 9, Jalan Thamby Abdullah Dua,
Brickfields, 50470 Kuala Lumpur.

Dear Sir,

Re: Approval of revised credit facilities

We are glad to inform you that we have approved the following revised facilities in your favour, with terms and conditions as follows:

Type and limit of facilities	: Secured Overdraft	RM 6,300,000
	End-financing	RM10,000,000

a Purpose : The secured overdraft is for financing the development of a housing estate known as Taman Sri Buloh with 236 low cost flats/houses, 148 single storey terrace houses, 177 double storey terrace houses and 13 double storey shophouses to be constructed under Phase I and II of the project.

b Interest rate : Interest on the secured overdraft is to be at 2.5% above our Base Lending Rate (BLR) calculated on the daily overdraft balance.

Our current BLR is 10% per annum subject to changes at the Bank's discretion.

Commitment fee : A commitment fee of 1.0% per annum will be levied on the unutilised portion of the overdraft facility.

c Disbursement : The secured overdraft is to be released in the following manner:

(i) RM200,000 on completion of legal and security documentations.
(ii) RM1,300,000 against production of satisfactory evidence for the payment of conversion premium and statutory fees.
(iii) balance of RM4,800,000 progressively against architect's certificate for works done with advance not exceeding 70% of the value per certificate.

d Security : The secured overdraft is to be secured by legal charge on land of 37.09 acres, valued at RM9 million by Khong & Jaafar per report dated 30 September 1983 to be developed into the said housing estate known as Taman Sri Buloh.

e Guarantees : (i) A fresh letter of continuing guarantee and indemnity is to be executed by the new directors of the company for the overdraft facility.
(ii) The secured overdraft facility is also to be against the corporate guarantee of Fai Chuen Corporation Sdn. Bhd.

f Redemption : The secured overdraft is to be repayable by way of redemption monies in respect of the aforesaid 236 low cost flats/houses, 148 single storey terrace houses, 177 double storey deluxe terrace houses and 13 double storey shophouses as follows:

Type	Redemption sum per unit
Low Cost Flats/Houses	RM 7,200
Single Storey Terrace House	RM16,000
Double Storey Deluxe Terrace House	RM25,000
Double Storey Shophouse	RM52,000

g Interest on the overdraft facility is to be serviced monthly.

h Conditions of loans accorded under End-Financing : The end-financing RM10 million facility is to be granted to the individual purchasers of the proposed development in Taman Sri Buloh as follows:

(i) (a) RM9 million for houses costing less than RM100,000 each with at least RM3 million being to finance Bumiputra buyers in this category.
(b) RM1 million for shophouses subject to the payment of a fee of 1/2% on the unutilised portion of the facility one year after the date of its acceptance by the company.

i (ii) against legal charge of individual titles or assignment of sales and purchase

agreement cum loan agreement and charge in escrow pending issuance of strata titles, in the case of flats.

(iii) against the guarantee of your company as well as the personal, joint and several guarantee of all the directors of your company until the issuance of the certificate of fitness for occupation to each respective building.

(iv) on the merits of each case in accordance to our Bank's normal guidelines for housing loans. However, the margin of advance on housing loans to non-bumiputra purchasers is to be considered at 80% instead of 75% for units priced between RM25,000 - RM100,000.

(v) the end-financing facility is to be made available up to 31 December 1987 after which the unutilised balance will be treated as cancelled.

It is clear from this letter that the sum of RM6.3 million was meant for financing the development of the housing estate which sum had already been disbursed and, *prima facie*, it should be sufficient to see the housing project through to completion and if this amount was not sufficient for the completion of the whole project certainly no blame could justifiably be laid on the respondent on account of the incompetence of the 1st appellant.

The other element of the breach of the banking contract is straightforward. The allegation was that the respondent adopted dilatory tactics in approving the 109 applications for the end-finance loans. Even after the Architect had duly certified to the respondent that the progressive works had been completed and all other contractual requirements for the release of those loans had been met, the respondent still refused to release the approved end-finance loans. It was on this second breach that the appellant pursued and canvassed before us, emphasis specifically laid upon the essential terms of the banking contract, embodied in the letter of offer dated 3 July 1986 that the overdraft was to be serviced from the redemption monies to come from the end-finance thereto. It was strenuously argued that when the respondent failed to provide the end-finance loans, the 1st appellant was unable to service the overdraft account, thereby entitling the 1st appellant to damages for the breach of the banking contract.

In their defence an affidavit in support of the application under O. 19 r. 9 the respondent averred that it was the responsibility of the 1st appellant to repay the overdraft facilities by whatever means and the redemption monies out of the end-finance loan was only one of them. We note that it was not provided either in the letter of offer or in the banking contract that the redemption monies were exclusively to be utilized to repay the bridging-finance loan.

What struck us as a seeming oddity in this argument was that if it was the appellant's case that the failure by the respondent to release the approved end-finance loans which was meant for servicing the bridging-finance loans, such argument would provide the appellants with a good defence in the event they were sued for failing to repay the bridging-finance loan. But, the appellants' case here was that such failure culminated in the failure of the appellants to continue with and complete the housing project. This is the pith and substance of the appellant's case before us, namely, its sheet-anchor.

Coming back to the letter of offer dated 3 July 1986, it was noted that the other conspicuous feature of the letter was that of-the specific and exclusive mode of repayment of both facilities were not stipulated therein though there was a provision that the secured overdraft, namely, the bridging-finance loan was to be repayable by way of redemption monies in respect of the 574 units of low-cost houses, single-storey terrace houses, double-storey deluxe terrace houses and double-storey shophouses. It should be explained by evidence in the absence of clear provision as to the mode of repayment whether there is a common practice adopted by all banking and financial institutions in the country that payment of the bridging-finance loan is exclusively by way of redemption monies or from any other available sources as in any ordinary loans. There is nothing sham about the defence raised by the respondent that the repayment of the bridging-finance loan may be made by other means at the disposal of the 1st appellant and not exclusively by way of the redemption monies.

It is also relevant to note that the RM10 million end-finance loans were to be granted, amongst other things, on the merits of each

case in accordance with the respondent's normal guidelines for housing loans. This condition was further amplified and reinforced by Clause 16 of the agreement dated 22 July 1985 entered into on the one part by the 1st appellant, referred to therein as the "company", Chien Kien Chuen, Hoo Ke Ping @ Hoo Khi Ping, Cheah Kok Cheong, Lim Fung Chee and Tengku Mustaffar Ibni Tengku Idris Shah and his guarantors and United Malayan Banking Corporation Bhd. on the second part which agreement was concerned merely with the terms and conditions relating to the end-finance facilities. Again, the absence of the mode of repayment of the end-finance facilities in this Agreement was conspicuous. Clause 16 of the Agreement on which the respondent relies as its defence on the question of their application to release the end-finance facility reads:

> (16) Notwithstanding anything to the contrary contained in this agreement the Bank shall be entitled at its absolute discretion to refuse to grant or continue to advance and release any of the loans or any part thereof to any of the Borrowers and nothing contained in this Agreement shall be deemed to render it obligatory upon the Bank either in law or in equity to grant or to continue to advance and release the loans or any part thereof and the company's and guarantors' respective liabilities under this Agreement shall not be discharged or released by virtue of the Bank refusing to grant or to continue to advance and release any of the loans or any part thereof.

This clause, in our view, offers the respondent a good defence which has merits and which the court should pay heed also. We assume without deciding that the terms of this clause negate specifically absolute obligation on the part of the respondent to approve any application for the end-finance to any applicant and that no applicant is entitled as of right to any loan applied for. Under the circumstances, how could it be argued that the repayment of the bridging-finance must, to the exclusion of all other methods of payment, be by redemption monies, accruing to the qualified borrowers but payable direct to the 1st appellant. If it is true, as a matter of banking practice which postulates and demands caution in processing any application for loan, that the respondent, and for that matter any other prudent banks, should take into account various factors before deciding whether to approve a loan to a particular applicant under the end-finance facility such as:

(a) whether the information supplied by the individual purchasers in their application forms provided sufficient material for the respondent to make a conceded decision one way or the other;
(b) whether the individual purchasers were in a financial position to repay; and
(c) if approved, the amount of any loan, which to a large extent depended on the individual purchaser's financial ability to service the loan;

then there is no absolute certainty that all the 223 applications will be approved. There must inevitably be some applicants who fail to measure up or meet the respondent's commercial standard to offer such loans. In any event, the respondent by way of the affidavit of Encik Azizan bin Adam disputed even the number of the approved purchasers. According to him the respondent only received 201 and not 203 applications of which 98 applications were approved while some were first approved and subsequently cancelled and the rest totally rejected. Of the approved applications the amount due to the applicants and indirectly to be paid to the 1st appellant would be in the region of RM2,661,500 and not RM7.07 million as alleged by the 1st appellant. Accordingly, arithmatically this sum would not be sufficient to repay the RM6.3 million bridging-finance loan and the 1st appellant would still be liable to be sued for the settlement of the balance of that loan together with interest, if any. This defence certainly has substance, providing a *bona fide* reasonable defence, and goes to reinforce the respondent's contention that the repayment of the bridging-finance loans was not solely and exclusively by way of redemption monies.

In our view, it is only proper that all these issues which are substantial and have merits ought to be tried at a proper trial so that witnesses may be called to explain to the court what is the nature of banking commercial practice in processing and approving the loan and other relevant issues. The justice of the case, bearing in mind the substantial claim of the damages, demands nothing less than a proper trial of all the issues.

There is another matter that we should address our minds to, and that is the question of remoteness of damages which really is a question of law for the trial Judge to decide. Again, assuming without deciding the question, whichever way the trial judge would decide the question of the real cause of action, either the total failure of the breach due to the breach of the respondent in not disbursing the bridging-finance facility to the 1st appellant or their failure to meet the requirements of the banking contract to release the end-finance facilities to 109 or 98 approved applications, as the case may be, or the combination of both breaches, the question of the remoteness of damages would have to be considered. But, the respondent denied the damages as claimed by the 1st appellant was due to the breach of the banking contract, thereby without explicitly pleading the issue which, in any event is a question of law and may not be pleaded specifically, (see *Independent Automatic Sales Ltd. v. Knowels & Foster* [1962] 3 All ER 27), raised the question of remoteness of damages. The test of remoteness of damages is relevant in the law of contract the basic principle of which had already been enunciated by Alderson B. in the case of *Hadley v. Baxendale* [1854] 9 Ex. 341. Remoteness of damages would certainly provide an arguable defence (per Sir Roger Ormrod) or a *prima facie* defence (per Lord Atkin). To put it concisely, the respondent has an explanation to all the allegations, the truth of which is denied by the 1st appellant. At this stage we are in no position to believe or disbelieve either party, merely on conflict of affidavits and mere interpretation of the agreement dated 22 July 1985 and other contemporaneous documents. These are matters to be argued in detail at the trial.

Under the circumstances, we see no ground is shown to justify us to interfere with the learned Judge's exercise of his discretion under O. 19 r. 9 of the Rules of the High Court 1980 although admittedly, his Lordship in his brief judgment did not discuss in detail the various questions of the merits of the defence. We, therefore, for the reasons above dismiss the appeal with costs. The deposit is to be paid to the respondent on account of taxed costs.